No. 75-519

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES W. JAMIESON,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES W. JAMIESON
Attorney for Appellant
(Pro Se)

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO.

CHARLES W. JAMIESON,

Appellant,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75-1052

Mr. Justices FAIRCHILD, DUFFY and PELL, JR.

To: The Honorable, The Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Appellant Charles W. Jamieson, prays that this August Tribunal will give consideration and credence to facts, escaped by the Courts below, viz.,

> The Tax Court in 33 T. M. C. and United States Court of Appeals under # 75-1052, "Not to be published."[?]

JURISDICTION

(b) The Judgment of the United States Court of Appeals was entered July 9, 1975. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(2).

(c) "An act repugnant to the Constitution is inoperable."

(2) Narrow interpretation of Sec. 165(a); Loss shall be treated as having been sustained on a certain day unless it is established that the loss was sustained on some other day. (Annotations) (January 13, 1971).

(3) Statutes of State of Illinois disregarded, Chap. 68, Secs. 50 to 59 inclusive, details to follow.

(4) Dictates of United States Supreme Court Ignored, details to follow. (VS separate trials)

(d)(1) Questions presented:

Whether or not appellant is entitled to a deduction for a casualty loss and, the costs of a suit to recover said loss?

(2) Whether or not the appellant is entitled to an exemption for his wife, his dependent?

(3) Whether or not the appellant, under circumstances; the Tax Court has jurisdiction to consider 1969 tax questions; having jurisdiction to regard that fact, appellant's grievances in both years being identical, thus avoiding a multiplicity of suits? (Countenanced by all Courts)

(4) Whether or not insouciance may be resorted to when a broad interpretation of substantive law is in order?

Statement of the Case

A. Appellant overpaid his 1968 income taxes. Due to confusion in the I. R. S. at Kansas City, appellant received a letter stating it had not received a check for said taxes and billing appellant for less than appellant's check and emburdening appellant with having to prove payment.

B. Conspirators, including the manager of American National Safe Deposit Co. opened appellant's safe deposit box with an extra key and taking therefrom $1600.00 emergency money and, converted said fund to their use. Appellant made written demand upon said American National for the return of said monies to no avail. There was an accounting in appellant's hand writing attached to said bundle of money showing the exact amount of $1600.00.

Appellant instituted suit naming the American National Safe Deposit Co., Sylvester Goldschmidt, its manager, American National Bank and Trust Co. (In whose hands part of said $1600.00 was found later), Charles L. Garry, auditor of said Bank in whose possession part of said money was found later.

Upon instituting said suit against said Safe Deposit company, said Sylvester Schmidt, manager, discontinued his relations with said vault company.

Trial was had on amended complaint and ensued through 1970 on appeals, 68 L 9704 *Jamieson* v. *American National Safe Deposit Co., et al.*

C. In June of 1970 the I. R. S. sent appellant a credit for $65.00 on his 1969 income taxes which appellant found inacceptable and wrote Kansas City to send appellant a letter in the nature of a deficiency letter upon which he could predicate a petition for refund for 1969 taxes together with his petition regarding 1968 taxes already pending in the Tax Court under # 252-71.

Contrary to statements made in two instances, appellant never received a deficiency letter from the Commissioner in response to appellant's request of March 9, 1971 (O:A:009:M.B.) although one was threatened by form letter March 1, 1971, but I.R.S. sent appellant three, several statements of account appertaining to 1969 taxes, on several dates for different amounts.

After this effort at compliance upon the part of appellant with irrelevant results, the Court will doubtlessly agree that the Tax Court had equitable jurisdiction to hear appellant with regard to income taxes for the year 1969 as well.

D. Appellant paid the rent during 1968, paid for the utilities and insurance and, gave his spouse, his dependent, monies with which to manage the home; with the exception of her efforts at home-making, his wife, Louise Jamieson, contributed nothing.

In order to maintain her aged father in a nursing home at $75.00 per week, Louise Jamieson sought and found lucrative employment for the purpose of maintaining her father in said home and for no other purpose. This had nothing to do with the Jamieson family or support; appellant just could not assume that additional burden.

Louise took her personal exemption, an exemption for the support of her father; she took no exemption on account of her age (68) because she didn't want her employer to know her age. (She formerly was an accountant for the Government and she had said "In government nothing is sacred"); petitioner took that exemption as his matter of right. (Authority, Paul Mertens)

E. Appellant herewith merely mentions the doctrine of Ejusdem Generis, to plead it later.

Nature of the Case and Argument

A loss is a loss until recovered; this the Commissioner admitted in writing and accepted in response to appellant's first schedule 1968; said Commissioner later attempted to renounce, doubtlessly upon the persuasion of his counsel,

Gersell v. *Cmmr.*, 48 TC, 161, 175.
Montleoni v. *Comm'r.*, 34 T. C. 688, 694.
Jones v. *Comm'r.*, 24 T. C. 525, 529, citing *Est. of Waterman*, 16 T. C. 467, 469 (In point).

In the above case losses were proven to the satisfaction of the Judges only.

Allen 16 T.C. Loss not allowed by Court; dissenting opinions by Judges Opper, Leech and Tietjens (A perfect arbiter); decision reversed on rehearing.

A loss is a loss until a "Bona fide" effort is made to recover said loss,

People ex rel. v. *McDonough*, 354 Ill. 438, 443.
People v. *C&N.W.R.*, 322 Ill. 150, 155.
Welch v. *Helvering*, 290 U.S. 111, 115, State Courts' rulings prevail.
DeCastro v. *Board etc.*, 322 U.S. 451, 455, 464, (This is the leading case on matters of the United States Supreme Court's permitting laws of the States to prevail)

Loss may be complete for taxation reduction purposes without taxpayer having to establish impossibility of recoupment,

U.S. v. *White etc.*, 274 U.S. 388, 409.
Clark v. *Welch*, 140 F.2d 271, 273.

In 171 F.2d 269, *Friedman* v. *Delaney,* where deductions were allowed for legal expenses, Chief Judge Magruder, in his especially concurring opinion said at page 273 "The statutes are pretty liberal and flexible in cases of this nature." (Sec. 212, Title 26 of the Code). Citing *Welch* v. *Helvering,* 290 U.S. 111, 113.

In *Paddleford* v. *Boardman,* 4 Mass. 548, 549, 551, plaintiff brought suit for partial loss; the Court allowed total loss; this, as the Court doubtlessly knows, is the leading case on the subject of losses.

Recovery process includes attorneys' fees,
U.S. v. *Union etc.,* 15 F.2d 383, 385,
58th Plaza v. *C'mr.,* 16 T. C. 469, 474.
Ander T. C. 47, 592, 596.

Expenses for litigation allowed,
5 Stars etc. v. *C'mr.,* 355 F.2d, 724, 727,
Deputy v. *DuPont,* 308 U.S. 488, 490.

Loss occurred in a prior year,
Lazonby v. *Tomliason,* 272 F.Supp., 558, 561,
Fuch's Est., 413 F.2d 503, 511.
Ander, 47 TC 592, Theft in 1957, suit to recover 1960.

Law of the situs governs,
Curtis Gallery v. *U.S.,* 241 F.Supp. 312, 315.
Bartlett v. *C. I. R.,* 114 F.2d 634, 638. Circumstances and conditions.

Loss considered the year deal was completed,
Goodstein v. *C. I. R.,* 267 F.2d 127, 131,
Davis v. *C. I. R.,* 241 F.2d 701, 704,
Philadelphia etc. v. *U.S.,* 126 F. Supp. 184, 189.

Taxes are levied, not on losses nor extraordinary expenses,
Higgins v. *Smith,* 308 U.S. 473, 475.

Substance, not form, is considered,
Ungar v. *C. I. R.,* 204 F.2d 322, 324, points 2 & 3.

Exemptions

The legislature of the State of Illinois, in the year 1967, reduced part of the Common Law to writing and, accordingly, Chapter 68 of its Statutes Sec. 50, a man's wife is his dependent and, in Sec. 51 there is a penalty chargeable to him for the nonsupport of said spouse,
Chapter 68, Secs. 50 through 59 also, *Wood* v. *Wood,* 61 S. 2d 438, 439, confirmed in 258 Ala. 72-75.

Appellant pleads the Uniform Reciprocal Enforcement of Support Act of Illinois Code, Chap. 68 Secs. 50 through 59, above.

Appellant pleads the 1969 Income Tax Reform Act, of which this Court will take judicial notice.

Taxing statement of doubtful intent, should be construed against Commissioner,
Feely v. *Cm'r.,* 296 U.S. 102, 111,
Crooks v. *Harrelson,* 282 U.S. 55, 59,
Smith v. *Baltimore, etc.,* 48 F.2d 861, 866.

It is a truism that a statute must be construed so as to carry out the legislative purpose viz that a man's wife is his dependent; penalty for his nonobservance,
Baker etc. v. *U.S.,* 231 F.2d 536, 539-40.

The Supreme Court of the United States accepts the rulings of the State Courts,
Schmidt v. *Bank etc.,* 334 U.S. 64, 66,

Phoenix etc. v. *Landis,* 231 U.S. 578, 584, (Mr. Justice Hughes rendered this decision),
Work v. *U.S.,* 231 U.S. 595, 599 (Mr. Chief Justice White)
Santa Fe etc. v. *Friday,* 232 U.S. 694, 700.

Although the Commissioner ruled to the contrary, the U.S. District Court determined that a man's wife is his dependent,

Application of Mrs. Greenberg, 39 F.2d 13, 16.

It is not the intention of the Congress to revolutionize the law governing the relations of husband and wife between themselves,

Thompson v. *Thompson,* 218 U.S. 611, 619,
Baker v. *Kilgore,* 145 U.S. 481, 491. (Leading cases)

A wife is entitled to the support of her husband,

Orono v. *Isbrandson,* 313 F.2d 241, 243.

In the *Meier* case, taxpayer supported his wife because he had to do so albeit, he was allowed an exemption for his wife,

39 B'rd, Tx, Apls., despite dissention at page 947, *Kirkland,* 39 B. T. A. 959, 960, citing *Loury,* 11 BTA, 409-410.

The scope of a Federal right is, of course, a Federal question; but, that does not mean that its content is not to be determined by State rather than Federal law. This is especially true where a statute deals with a familial relationship; there is no Federal law of domestic relations, which is primarily a matter of State concern,

DeSylva v. *Ballantyne,* 351 U.S. 570, 580,
R. F. C. v. *Beaver etc.,* 328 U.S. 204, 299,
Board etc. v. *U.S.,* 308 U.S. 351, 352.

Findings of fact that are induced by an erroneous view of the law are not binding,

Galina etc. v. *Scofield,* 218 F.2d 217, 219.
"Any apology here made in behalf of the Court's action was far from good taste and, out of order"

The Tax Court had equitable jurisdiction to hear and consider questions appertaining to Appellant's 1969 taxes,

Ogden City v. *Armstrong,* 168 U.S. 224, 237.

Doubtful words in taxing laws must be construed in favor of taxpayer and against Commissioner,

U.S. v. *Merriam,* 263 U.S. 179, 186,
Gould v. *Gould,* 245 U.S. 151, 153.

Findings of the Commissioner in his deficiency letters and reports are conclusions of law which he is not empowered to make,

Smith v. *Cm'r.,* 141 F.2d 529, 532.

It took almost two years after the raid on appellant's safe deposit box for him to prepare his case and, to be sure his premises were correct. The local limitation statutes had not run out; the trial judge raised no question as to time but, after amended complaint he, the Judge, did ignore leading case rulings in the United States Supreme Court (*Patten* v. *U.S.,* 226 U.S. 525, 544, piecemeal rulings) making it necessary for appellant to resort to his first appeal.

Contrary to the position assumed by the Commissioner, suits at law cannot be started and concluded in the same calendar year, as continuances and appeals may follow together with additional costs, all chargeable to the original action. These said charges and time are properly charged back; said charges being extraordinary and therefore deductible adverse to the reaction of the Commissioner.

Congress intended income taxes to tax earnings less expenses and losses,

Est. of Walling v. *Cm'r.*, 373 F.2d 190-191 (1966).

Code does not define family but regulations do and, former Chief Judge of the Tax Court Tietjens an (Outstanding arbiter) said "Regulations interpret the Code".

Thus, Appellant is relying upon Sec. 1.165-1(d)(4) which is—The rules of this paragraph are applicable with respect to a casualty or other event which may result in a loss and which occurs after the date of the publication of this paragraph in the Federal Register as a Treasury decision. If the casualty or other event occurs on or before such date, a taxpayer may treat any loss resulting therefrom in accordance with the rules then applicable, or, if he so desires, in accordance with the provisions of this paragraph; but no provisions of this paragraph shall be construed to permit a deduction of the same loss or any part thereof in more than one taxable year or to extend the period of limitations within which a claim or credit or refund may be filed under section 6511.

No definite legal test is provided by the statute for the determination of the year in which the loss is to be deducted,

Boehm v. *C. I. R.*, 326 U.S. 287, 293.
U.S. v. *White etc.*, 274 U.S. 394, 400.

In the course of the trial in the Tax Court an attorney for the Commissioner introduced the 1968 schedule of Louise Jamieson in evidence; appellant objected on the grounds that its submission would be a breach of confidence between the Commissioner and Louise Jamieson, this being not a criminal case. The Tax Court allowed said schedule to be admitted to which appellant took exception,

> "An act repugnant to the Constitution is inoperable."

This act of the Trial Court was acquiesced in by the United States Court of Appeals.

> "A denial in the Tax Court is not an inexorable command, it would be intolerable if it were."
> *Galina* v. *Schofield*, 218 F.2d 217, 219.

Title 26, Sec. 212 pertains to the determination, collection and refund of taxes citing,

Buder v. *U.S.*, 221 F. Supp. 425, 432.

Appellant told the head auditor in the District Director's offices in Chicago, with regard to his, appellant's schedule for 1968 that he the taxpayer, should not be confronted with shortcomings until his schedule had been audited; to which said chief auditor replied "We do not audit every schedule, we are just not staffed for such." Appellant loaned the auditor his copies for the auditor to make copies of in order to do a proper auditing job; he didn't return all to appellant nor send appellant a copy of such audit.

The 1969 Income Tax Reform Law was signed into law on the 30th day of December, 1968.

The statements sent appellant regarding 1969 taxes were mere cursory calculations showing difficulty in the offices of I.R.S. at Kansas City.

Taxpayer should not have to make special request for tax refund; line 25 on 1968 tax form provides for such as do the forms prior and since that of 1968. Appellant should not have to undergo the indignity of having his knowledge of income tax law discounted because of the undue influence of the Commissioner, since the regime of Mr. Johnnie M. Walters.

Appellant pleads the doctrine of Ejusdem Generis,
(*Bock* v. *Perkins*, 139 U.S. 628, 639.)

Neither the Commissioner nor the Tax Court or the United States Court of Appeals, although they all considered the case of *Jamieson* v. *Commissioner,* 353 F.2d 1 (1965) (Please see Appendix A), saw fit to interpose said case nor to shorten the proceedings in said Appeals Court under # 252-71, by deeming said 1965 case as Res Judicata of the case at bar thus, creating an impasse in the nature of an estoppel here. (The findings of the appeals Court were pregnant with error, please see Appendix A, paragraphs numbered 1 to 9.

This appeal is not to be construed as an attempt to recover the unrecovered portion of the theft monies. In passing, however, it is regrettable that the State has limitation laws even against Quasi-criminal acts.

At the conclusion of the preliminary hearing in Chambers, the trial Judge, possibly annoyed at appellant's replying in quotations from the Statutes and the Code, to questions of the Court, told appellant that he, The Court, was going to overrule appellant at the Formal Hearing to which appellant replied that the Court would have a change of heart after reviewing appellant's Brief and Reply Brief.

For the reasons categorized it is fervently urged that this Tribunal will reverse the findings and the decisions of the Courts below, remanding, with directions that the refunds shown on appellant's schedules for 1967, 1968 and 1969 be made to appellant accordingly.

And, this appellant further prays.

Ubi jus, ibi remedium.

Respectfully submitted,

CHARLES W. JAMIESON
Attorney—Pro se
Member United States Supreme Court Bar

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
Submitted July 1, 1975
July 9, 1975.

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

CHARLES W. JAMIESON,

Appellant,

No. 75-1052 *vs.*

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Appeal from the United States Tax Court
Docket No. 252-71
DARREL D. WILES, *Judge.*

ORDER

This is an appeal from a decision of the United States Tax Court which determined that under §165 of the Internal Revenue Code of 1954 (1) taxpayer was not entitled to a theft loss deduction for the taxable year 1968; (2) that taxpayer was not entitled to more than the standard deduction on his 1968 tax return; (3) that taxpayer was not entitled to claim an exemption for his wife on his 1968 separate tax return, and (4) a dismissal of taxpayer's petition insofar as it related to the year 1969, for lack of jurisdiction.

The findings of fact and the opinion, filed on August 21, 1974, are reported at 33 T.M.C. 964. Taxpayer filed a timely notice of appeal. Taxpayer signed his briefs in the current case with his name and "Pro se" and as "Member of United States Supreme Court bar."

Taxpayer filed a separate income tax return for 1968, although at that time he was married to Louise Jamieson. He later filed four amended returns for the year 1968. It was on the last of these four returns that taxpayer claimed the "65 or over" exemption for his wife.

1. During the year 1968, taxpayer's wife had a gross income and filed a separate income tax return. She claimed both the personal exemption for herself and also the "65 or over" exemption.

Taxpayer, on his fourth amended return claimed as a deduction, a purported theft loss of $1500.00 and legal costs of $487.24, which he claimed he incurred in attempting to recover his property.

Testimony disclosed taxpayer had leased a safety deposit box from American National Safe Deposit Company, in which he stored money and other valuables. On July 5, 1966, taxpayer claimed he discovered that $1600.00 in cash was missing.

Taxpayer reported the loss to American, which tendered his $1460.00 in cash. American refused to accept the receipt prepared by taxpayer, so taxpayer did not receive the sum offered.

Taxpayer filed suit against American and others. This litigation was terminated in 1972, taxpayer recovering only $1460.00.

In *Jamieson* v. *Commissioner of Internal Revenue,* 353 F. 2d 1 (1965), a case involving the same taxpayer as here, the court stated on Page 2:

> "Under §151(b), a husband, as a taxpayer, may not on his separate return claim a deduction for a $600 personal exemption of his wife, in addition to his own $600 exemption, where she had gross income during the husband's taxable year."

2. It is without dispute on this record that taxpayer's wife not only had gross income in 1968, but also that she had filed a separate income tax return for that year. Further, taxpayer's wife claimed both the "regular" and "65 or over" exemption for herself.

3. Taxpayer used the cash method of reporting his income and deductions. Therefore, he cannot claim in 1968 any deduction which was incurred and paid in other years.

4. We sustain the decision of the Tax Court that petitioner did not sustain a deductible theft loss in 1968 under §165 I.R.C. 1954. We also approve the decision that petitioner cannot claim an exemption for his wife under §151 (b) I.R.C. 1954.

5. The alleged theft was discovered in 1966. Any resulting loss was deductible only in that year, unless the taxpayer established at the end of the year 1966, there existed a reasonable prospect of recovering his property. The fact here is that the prospect of recovery continued until 1972. It seems clear that no such basis existed at the end of the year 1968.

6. The remaining deductions claimed were less than the $500.00 standard deduction allowed by the Commissioner.

7. The Tax Court was also correct in dismissing taxpayer's petition for the year 1969. No deficiency notice had been issued for the year 1969.

8. We hold the Tax Court was correct in holding that taxpayer was not entitled to claim an exemption for his wife on her 1968 separate income tax return.

9. We further hold that the Tax Court correctly dismissed taxpayer's petition insofar as it related to the year 1969 for lack of jurisdiction.

Taxpayer has made further arguments which we have considered, but which do not merit further discussion by us.

The decision of the Tax Court is

AFFIRMED.

APPENDIX B

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
July 9, 1975

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*

CHARLES W. JAMIESON,

Appellant,

No. 75-1052 *vs.*

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Appeal from the Tax Court of the United States.
Docket No. 252-71
DARREL D. WILES, *Judge.*

This cause came on to be heard on the transcript of the record from the Tax Court of the United States.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said Tax Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed

against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs for and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of records. The cost of printing or otherwise producing necessary copies of briefs, appendices, or copies of record authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment.

(d) Clerk to Insert Costs in Mandate. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate. If the mandate has been issued before final determination of costs, the statement, or any amendment thereof, may be added to the mandate at any time upon request of the clerk of the court of appeals.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

Supreme Court, U. S.
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No. 75-519

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES W. JAMIESON, APPELLANT

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS AND MEMORANDUM FOR THE APPELLEE IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-519

CHARLES W. JAMIESON, APPELLANT

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COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS AND MEMORANDUM FOR THE APPELLEE IN OPPOSITION

Appellants seeks review of a decision of a court of appeals in a federal income tax case. However, he does not draw into question the constitutionality of any federal statute as required by 28 U.S.C. 2101(a). Accordingly, the appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari under 28 U.S.C. 2103, the petition should be denied.

Appellee claims that the courts below erred in disallowing: (1) a theft loss deduction for 1968; (2) various itemized deductions instead of the $500 standard deduction; and (3) an additional personal exemption for his wife on his separate tax return for 1968. The Tax

Court upheld the Commissioner's deficiency and the court of appeals affirmed in an unpublished *per curiam* order (Pet. App. B).[1]

1. It is well established that a theft loss is deductible only in the year in which the loss is discovered unless there exists a reasonable prospect of recovery in that year. In that event, the loss is deductible in the year the prospect of recovery ceases to exist. Section 165(e) of the Internal Revenue Code of 1954; *Parmelee Transportation Co.* v. *United States,* 351 F.2d 619, 627-629 (Ct. Cl.); Treasury Regulations on Income Tax (1954 Code), Section 1.165(d)(3) (26 C.F.R.). here, appellant discovered his alleged theft loss in 1966, and there was a reasonable prospect of recovery until 1972 (Pet. App. A 3). Thus, the courts below correctly held that appellant was not entitled in 1968 to a deduction for his alleged loss.

2. Appellant further urges (Pet. 2, 9) that his allowable itemized deductions for 1968 exceeded the $500 standard deduction allowed by the Commissioner. However, the record shows that there was no allowable theft loss deduction in 1968 (Pet. App. A 3) and that the majority of appellant's legal costs were not deductible in 1968 because he paid them in other years (Tr. 16-17, 26-27; Treasury Regulations on Income Tax (1954 Code), Section 1.461-1(a)(1) and (3)(i) (26 C.F.R.)). Thus, the courts below correctly held that appellant was limited to the $500 standard deduction in lieu of his claimed itemized deductions since the remaining deductions were less than the standard deduction.

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[1]The Tax Court also granted the Commissioner's motion to dismiss the petition with respect to the year 1969 for lack of jurisdiction because the notice of deficiency did not include 1969 (Tr. 4, 29-32; Docket Entries, p. 2).

3. Appellant also asserts (Pet. 2, 7-8) that he was entitled to an additional personal exemption for his wife on his 1968 return because she was more than 65 years old. But a married taxpayer filing a separate tax return cannot claim any exemption for his spouse if the spouse had any gross income during the taxable year. Section 151(b) of the 1954 Code; *Jamieson* v. *Commissioner,* 353 F. 2d 1 (C.A. 7). Here, appellant's spouse not only had gross income in 1968 but she filed a separate return for that year in which she claimed both the "regular" and "65 or over" exemption for herself (Pet. App. A 3; Tr. 22; Ex. I).[2] Thus, appellant could not claim any exemption for his wife.[3]

For the reasons stated, it is respectfully submitted that the appeal should be dismissed or alternatively that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[2]Nor is appellant entitled to claim an exemption for his spouse as a dependent since Section 152(a)(9) excludes a spouse from the statutory definition of dependent for purposes of an exemption under Section 151(e). See *Dewsbury* v. *United States,* 146 F. Supp. 467 (Ct. Cl.); Rev. Rul. 55-325, 1955-1 Cum. Bull. 18.

[3]The courts below also correctly held that the Tax Court properly dismissed appellant's suit for 1969 because no deficiency notice had been issued for 1969 at the time the petition was filed in the Tax Court. Thus, the Tax Court had no jurisdiction over the year 1969. See Section 6213(a) of the Code; *Kennedy* v. *Commissioner,* 339 F. 2d 335 (C.A. 7). The fact that a notice of deficiency subsequently was issued for 1969 did not cure the jurisdictional defect in the petition. *Kennedy* v. *Commissioner, supra, 339 F.2d* at 337. Although appellant could have obtained review of the deficiency determined for 1969 had he filed a petition in the Tax Court within 90 days of his receipt of the deficiency notice for that year, he failed to take such action. Accordingly, the Tax Court had no jurisdiction over the year 1969. *Page* v. *Commissioner,* 297 F.2d 733 (C.A. 8).

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